INSANITY AND CRIMINAL RESPONSIBILITY

II

FOR the purpose of comparing the scope of the proposed section with existing rules, the law in three prominent states (Massachusetts, New York, and Illinois) will now be examined.

Massachusetts. The Supreme Judicial Court in 1905 approved the following test of responsibility:

"In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, *or* [81] controlling mental powers, *or* [81] if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." [82]

The same court in 1914 announced the following "working rule whereby the jury are to be guided" in cases where the defense is insanity:

"If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, *and* [81] judgment, *and* [81] whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it." [83]

The later test is capable of two interpretations. It may be regarded as meaning (1) that there shall be lack of reason, conscience, and judgment in addition to the existence of an irresistible impulse, or (2) that, though reason, conscience, and judgment are still active, the impulse being irresistible cannot be restrained by them. As the conjunctive connective is used, the first would seem to be the proper interpretation.

[81] The italics are the present writer's.

[82] Commonwealth *v.* Johnson, 188 Mass. 382, 388, 74 N. E. 939 (1905).

[83] Commonwealth *v.* Cooper, 219 Mass. 1, 5, 106 N. E. 545 (1914).

However interpreted, it will be noted at once that the later test differs largely from the earlier. According to the earlier one there is no responsibility if there is either no will *or* no conscience *or* no power of control *or* no intellectual power. If, for instance, a defendant has normal will power and intelligence, nevertheless he would not be responsible if he has no conscience. Under the first interpretation of the later test the only defense would be irresistible impulse. Under the second interpretation reason, conscience, judgment, *and* power of control must all be lacking in order that there may be a defense. This is a condition which seldom occurs. A striking contrast to the last announcement of the Supreme Judicial Court is presented by the charge of the trial judge to the jury in the same case. He told them "the defendant could not be convicted if from mental disease he was unable to form a criminal intent," which test closely resembles the provision of the proposed section.

Both the tests announced by the court — the one in 1905 and the one in 1914 — were taken verbatim from the famous charge to the jury by Chief Justice Shaw in the *Rogers Case*.[84] His statement of the law regarding insanity has been the object of great admiration and praise. So great a legal writer as Professor Greenleaf in his treatise on Evidence describes it as a "lucid exposition of the law,"[85] and this statement has remained unchallenged by the subsequent editors.

In view of the prestige which it enjoys and the position which it occupies as the basis of the present law in Massachusetts this charge of Chief Justice Shaw deserves careful analysis. The first part of the charge as it appears in the official report is as follows:[86]

1. "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

2. "But these are extremes easily distinguished, and not to be mis-

[84] Commonwealth *v.* Rogers, 7 Metc. (Mass.) 500 (1844).

[85] 2 GREENLEAF, EVIDENCE, § 372, note.

[86] The numbering of the paragraphs is by the present writer.

taken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

3. "On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

4. "If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

5. "The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion." [87]

Before charging with special reference to the case the chief justice made several preliminary statements of a general character, which culminated in the announcement of the following principle:

"A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts, under like circumstances, must have sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong, in regard to the particular act about to

[87] 7 Metc. (Mass.) 500, 501 (1844).

be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it." [88]

In the first paragraph, which is the one adopted as the sole test by the Supreme Judicial Court in 1905, the chief justice starts out by stating a general principle similar to that of the proposed section. If he had confined "criminal intent," which varies in different crimes, to that necessary for murder, which was the charge of the indictment in the case, the similarity would have been still greater.

This statement of a general principle of law, instead of being followed, as might be reasonably expected, by a discussion of the requisites of criminal intent, is followed by an enumeration of certain mental phenomena, an analysis of which discloses a considerable degree of confusion. First, lack of "will," "conscience," and "controlling mental power" are spoken of as resulting from a deficiency of "reason" and "mental powers." What is the distinction intended to be made between "will" and "controlling mental power"? As the lack of either of these is said to be a defense, the distinction is material. Is "reason" not a "mental power"? Can lack of "will" result from a deficiency of "reason"? There are further difficulties involved in the statement. In the next clause the obliteration of "intellectual power" by the "overwhelming violence of mental disease" is mentioned. Does "intellectual power" mean the same thing as "mental power," in the preceding clause? In one clause "deficiency of mental powers" is used, and in the next "mental disease." There is a well-recognized difference between "mental defect" and "mental disease." Since there is no indication that such a distinction was intended to be made, these terms were evidently not used advisedly in the charge. As appears from the first two sentences of the second paragraph, the tests of the first paragraph apply to the case of total insanity. According to these tests, one who has complete will power and intellectual power, but has no conscience, is totally insane.

In the second paragraph the chief justice is discussing what he calls "partial insanity," one of the characteristics of which he intimates is absence of delusion. In contradiction to this he describes, in the beginning of the fifth paragraph, partial insanity as consisting

[88] BIGELOW & BEMIS, TRIAL OF ABNER ROGERS, 275.

of "melancholy accompanied by delusion." In the test of responsibility in case of partial insanity a new element, not appearing in the requirements where the insanity is total, is introduced, *viz.*, ability to distinguish between right and wrong with reference to the particular act. When "wrong" is first used it is impossible to determine from the context whether moral wrong or legal wrong is meant, but later "wrong" is joined with "criminal," and followed by "punishment," so legal wrong would seem to be there intended. In the last sentence of the second paragraph a new mental element, *viz.*, "memory," is introduced and made a test. It is difficult to see the relation which the second clause of this sentence bears to the first. According to the grammatical construction they are in apposition, but this cannot be since they are entirely different. Should the connective be "or" or "and"? The choice is important, as it greatly affects the scope of the rule. In this last clause the use of the terms "justice," "right," and "duty" indicates that there has been a transition from "legal wrong" to "moral wrong."

In the third paragraph two new elements are introduced, *viz.*, "understanding the nature and character of the act, and its consequences," and "mental power sufficient to apply that knowledge [that the act is wrong and criminal] to his own case." The joining of "criminal" and "punishment" to "wrong" in this paragraph indicates that moral wrong has been abandoned for legal wrong.

The fourth paragraph, the one adopted in 1914 by the Supreme Judicial Court as its "working rule," is apparently applicable in all cases. The Chief Justice, however, as appears from the first sentence of the fifth paragraph, was applying this rule to the case of "partial insanity." A comparison of the first and fourth paragraphs shows that, according to the tests laid down, a person whose intellectual and will powers are unimpaired but who has no conscience is totally insane and is not legally responsible, whereas a partially insane person, according to one interpretation of paragraph four, must be deprived of his reason, conscience, judgment, *and* power of control in order to have a defense, and according to the other interpretation must have had an irresistible impulse.

Following the paragraphs that have been discussed the Chief Justice laid down two new tests with special reference to delusion. This was said to be a defense (1) when "the person under its influence has a real and firm belief of some fact, not true in itself,

but which if it were true would excuse the act," (2) where the wrongful act was the result of "uncontrollable impulse." The first of these is the "mistake of fact" test, which is based on the incorrect premise that apart from the delusion the person is entirely sane.

The tests put to the jury by the Chief Justice, differing as they do among themselves, also differ from the rule announced in the preliminary statement. No distinction is here made between total and partial insanity, and the sole requirement is inability to distinguish between right and wrong with reference to the particular act, the word "punishment" indicating that "legal wrong" is meant.

The amount of practical value possessed by the charge of Chief Justice Shaw may be determined from the fact that the jury in the case, after hearing the charge and retiring for several hours, returned to the court room, and, according to the official report, asked the Chief Justice: "What degree of insanity will amount to a justification of the offense?"

The justification for using so much space in pointing out the inconsistencies and defects of this famous statement of the law relative to insanity is the fact that the reverence with which it has been and is regarded and its frequent citation have embarrassed clear thinking on the subject. Further than this, the Supreme Judicial Court of Massachusetts, as has been shown, still regards it as authoritative.

Notwithstanding the extremely narrow application of the "working rule" last announced by the highest court, it is highly probable that irresistible impulse unaccompanied by inability to distinguish between right and wrong, or the converse situation, would be held in a concrete case to constitute a defense.[89] The charge of the trial judge to the jury is likely to be broader than the rule of the upper court. In other words, the living law in this respect is more comprehensive than the formal law. As regards delusion, the test which would now probably be given to a jury in Massachusetts would be the "mistake of fact" rule laid down by Chief Justice Shaw.[90] According to the Massachusetts law insanity cannot reduce the degree of the offense charged in a case where it was not

[89] *Dicta* to this effect occur in Commonwealth *v.* Cooper, 219 Mass. 1, 5, 106 N. E. 545 (1914).

[90] Such is the view taken in the editorial note now under discussion. 30 HARV. L. REV. 179.

sufficient to relieve entirely from responsibility.[91] In both these instances the law would be changed by the adoption of the proposed statute.

Whether the law of Massachusetts relative to the criminal responsibility of the insane is represented by the entire charge of Chief Justice Shaw in the *Rogers Case*, or by the rule last announced by the Supreme Judicial Court, or by what the writer has ventured to suggest is the living law, it is submitted as a result of the foregoing discussion that each of these is less logical, less practical, and less comprehensive than the test of the proposed section.

New York. The New York statute on the responsibility of an idiot or lunatic is as follows:

"An act done by a person who is an idiot, imbecile, lunatic, or insane is not a crime.

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. "Not to know the nature and quality of the act he was doing; or,
2. "Not to know that the act was wrong."[92]

The two provisions of this statute seem to be in conflict with each other. According to the first, the mere fact that the defendant is an idiot, imbecile, or lunatic is a complete defense. Under the second, such person must satisfy the "lack of knowledge" requirement. The Court of Appeals of New York in interpreting this statute has in effect disregarded the first provision by regarding the test of the second as a definition of idiocy, insanity, and lunacy. This view of insanity prevailed before the enactment of the statute. In *Willis* v. *People*, 1865, the Court of Appeals adopted the following statement:

"A person is not insane who knows right from wrong and that the act he is committing is a violation of law and wrong in itself."[93]

In 1873 it was squarely decided that irresistible impulse was no defense.[94] The statute simply codified the previous law.

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[91] Commonwealth *v.* Cooper, 219 Mass. 1, 106 N. E. 545 (1914).

[92] PENAL LAW, 1909, § 1120.

[93] 32 N. Y. 715, 719.

[94] Flanagan *v.* People, 52 N. Y. 467 (1873). In People *v.* McElvaine, 125 N. Y. 596, 602, 26 N. E. 929 (1891), the Court of Appeals suggested, probably unadvisedly,

The second provision of the statute has been strictly followed for all forms of insanity with the possible exception of delusion. In *People* v. *Silverman*, 1905, it is said:

"Whatever may be the opinion of physicians or medical experts on the subject, there is but one test of responsibility known to the law, that found in section 21 of the Penal Code, which is but a statutory declaration of the law, as it had long prevailed." [95]

In *People* v. *Taylor*, 1893, the Court of Appeals, while announcing the "right and wrong" rule of the statute, says:

"An insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act of taking his life, unless it is of such a character, that if it had been true, it would have rendered the homicide excusable or justifiable." [96]

A similar statement was made in *People* v. *Ferraro*, 1900.[97] In *People* v. *Schmidt*, 1915,[98] it was held that the test of the statute applies to the case of delusion, and the "mistake of fact" test was not mentioned. The Court of Appeals in that case defined "wrong" in the statute to include moral as well as legal wrong, and held erroneous the instruction of the trial judge that "wrong" means "contrary to the law of the State." The court also announced that irresistible impulse is no defense in New York. This case is an authoritative announcement that the law in New York is in strict accord with the provision of the statute.

Under a rule as narrow as that in New York it is likely to happen, as it did in the *Thaw Case*, that the jury will acquit, on the ground of insanity, persons who do not come within the rule. It was not seriously contended in the *Thaw Case* that the defendant did not know that his act was both legally and morally wrong.

It is clear that the provision of the proposed section is more

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that lack of control is a relevant consideration: "On the whole case it seems quite clear to us that the defendant had sufficient intelligence and self-control to understand the nature and character of the act committed by him, and to refrain from its commission if found to be inconsistent with a due regard for his own safety or interest."

[95] 181 N. Y. 235, 240, 73 N. E. 980. A similar statement was made in People *v.* Carlin, 194 N. Y. 448, 455, 87 N. E. 805 (1909).

[96] 138 N. Y. 398, 406, 34 N. E. 275. The court in this case states that the New York rule has been criticized by eminent alienists because it does not take into consideration lack of self-restraint.

[97] 161 N. Y. 365, 378, 55 N. E. 931.

[98] 216 N. Y. 324, 110 N. E. 945 (1915).

comprehensive than that of the New York statute. It is submitted that the former is also more logical and more practical.

Illinois. The existing Illinois statute, which was enacted at least as early as 1827, reads as follows:

"A lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: *Provided*, the act so charged as criminal shall have been committed in the condition of insanity." [99]

This statute lays down an amazing proposition — that only those lunatics and insane persons who have no "lucid intervals" shall be exempt from punishment. The proviso of the statute is redundant and superfluous, for if the insane person had no lucid intervals any act done by him must necessarily have been done in a "condition of insanity." The statute prescribes no symptoms, but simply requires a state of lunacy or insanity without "lucid intervals."

The tests actually applied by the courts of Illinois have been entirely independent of the statute. In the first case before the Supreme Court, 1860,[100] the trial judge had charged the jury as follows:

"Before the jury can acquit the prisoner on the ground of insanity, they must believe, from the evidence, that at the time of the killing he was in a condition of insanity; that his insanity was of such a character that he did not understand the nature, quality, and character of the act he was committing; or that knowing it, he was acting under such an impulse of passion or insane desire to kill, as to exempt him from the dominion and control of reason. In order for the jury to acquit on the latter ground, they should be satisfied, from the evidence, that this insane desire was of a character that inclined the prisoner to acts of homicide, that is, that it was evinced in attempts at killing in more than a single instance, and must be made to appear in more than the single act of killing the deceased."

This charge was approved by the Supreme Court. The trial judge refused to charge, as requested by the defendant, that although the defendant may not have been so insane as to excuse him entirely, yet it might reduce the degree of the crime from murder to manslaughter. The Supreme Court held this instruction should have been given, saying:

[99] ILL. ANNOT. STAT. 1913, § 3977.

[100] Fisher *v.* People, 23 Ill. 283.

"Though such a state of mind would not excuse the homicide, it should reduce it to manslaughter, for deliberation would be absent, and that is essential to constitute murder."

The court made no reference to the statute.

Three years later, the Supreme Court in *Hopps* v. *State*, where the defense was insane delusion, after stating that the authorities were in great confusion, and that it is difficult to lay down a general rule, announced the following:

"Whenever it should appear from the evidence, that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, justice and humanity alike demand an acquittal." [101]

According to the first part of this rule an uncontrollable impulse must concur with and be the product of the inability to distinguish between right and wrong. In addition to the fact that in most cases of irresistible impulse the power to know right from wrong is not destroyed, it is very doubtful if causal connection can in any case be established between these two symptoms. At best this test covers an extremely small class of cases. In contrast to this test, which according to its wording seems to be applicable to all cases, is the statement regarding delusion. It is difficult to see how these can be reconciled. The Supreme Court in the *Hopps Case* took no notice of their former decision and made no reference to the statute except the following:

"Our statute was designed to ameliorate the rigor of the old rule of the common law, in declaring that a person 'affected with insanity,' shall not be considered a fit subject of punishment, for an act done, which, under other circumstances or disposition of mind, would be criminal."

In *Dunn* v. *People*,[102] 1884, the trial court in one instruction said:

[101] 31 Ill. 385, 391.
[102] 109 Ill. 635, 643.

"If at the time of committing the alleged act defendant was able to distinguish right from wrong, then you can not acquit him on the ground of insanity,"

and in another instruction stated in effect that either inability to distinguish between right and wrong or uncontrollable impulse would be a defense. The Supreme Court approved both instructions and quoted the rule of the *Hopps Case* in support of them.

Two years later in the case of *Dacey* v. *People*,[103] the trial judge charged the jury in the words of the general test of the *Hopps Case*, and this was approved by the Supreme Court. Though the evidence showed delusional insanity, neither the trial court nor the Supreme Court made any reference to the special test for delusion laid down in the *Hopps Case*.

In *Hornish* v. *People*,[104] 1892, the trial judge charged in effect that either inability to distinguish between right and wrong or inability "to choose either to do or not to do the acts constituting such crime, and to govern his conduct in accordance with such choice" would be a defense. This was approved by the Supreme Court, who said it was in accord with the test of the *Hopps Case*. This test was approved in two subsequent cases in 1894[105] and 1895.[106]

In *O'Shea* v. *People*,[107] 1905, the trial judge in examining a witness stated that "insanity does not involve the question of right and wrong." This was held erroneous, the Supreme Court saying:

"Where insanity is interposed as a defense to crime, it involves the defendant's knowledge of right and wrong."

The *Hopps Case* was not cited. The Supreme Court in 1915[108] impliedly approved the test of the *Hopps Case*. This review of the Illinois cases leaves one in doubt as to what is the law in that state relative to insanity. None of the cases cite the provisions of the statute, so that may be disregarded. As the general test of the *Hopps Case* has been so many times approved by the Supreme Court, they would probably do so again. In practice some trial

[103] 116 Ill. 555, 6 N. E. 165.
[104] 142 Ill. 620, 32 N. E. 677.
[105] Lilly *v.* People, 148 Ill. 467, 36 N. E. 95.
[106] Meyer *v.* People, 156 Ill. 126, 40 N. E. 490.
[107] 218 Ill. 352, 75 N. E. 981.
[108] People *v.* Penman, 271 Ill. 82, 110 N. E. 894.

judges charge that either inability to distinguish between right and wrong or irresistible impulse is a defense. There seems now to be no special rule for delusion, such as announced in the *Hopps Case.*

However it may be regarded, the law of Illinois relative to insanity is less logical, less practicable, and less comprehensive than the rule of the proposed section.

The merits of the proposed section, in comparison with the existing legal tests relative to the defense of insanity, may be briefly summarized.

I. The proposed section is based upon the fundamental principle of criminal jurisprudence, that a crime has not been committed when the necessary mental element is lacking. The direct relation of insanity to this mental element, which relation is logically apparent, was formerly well recognized in the law. The Roman law set forth clearly that the effect of insanity was to negative the wrongful state of mind.[109] At an early period in the English law Staundforde stated the same proposition.[110] This relation between insanity and the mental element of crimes was largely lost sight of when the courts commenced announcing and attempting to apply medical tests. Some judges and writers, however, continued to state that insanity negatives criminal intent.[111] The provision of the proposed section is more exact than this statement in that it recognizes the fact that the mental element of crimes is not a constant quantity, and narrows the issue to whether the mental element of the crime charged has been negatived by the mental disease.

II. The proposed section embodies no medical or psychological theories and consequently will not be affected by changing

[109] *Furiosi . . . nulla voluntas est.* DIG. 50, 17, 40.

Furiosus . . . doli capax non est. DIG. 47, 10, 3, 1.

. . . Et ideo quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit; quae enim in eo culpa sit, quum suae mentis non sit? DIG. 9, 2, 5, 2.

[110] *Ceo est quant un tua auter oue felonious volunte ou intente, quel chose home de non sane memorie, ne peut faire.* STAUNDFORDE, LES PLEES DEL CORON, Lib. 1, Cap. 9.

[111] "By reason of his incapacity, he cannot act *felleo animo.*" HIGHMORE, LAW OF LUNACY, 197.

"At the trial where insanity is set up as a defense, two questions are presented: — First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?" Ladd, J., in State *v.* Jones, 50 N. H. 369, 393 (1871). To the same effect are COLLINSON, LUNATICS, 471; COOPER, MEDICAL JURISPRUDENCE, 380; HARRIS, CRIMINAL LAW, 12 ed., 16.

views as to the nature and scope of mental disease. The difficulty with the existing legal tests on this subject is that they are based on medical theories,[112] many of which are obsolete and with which

[112] The "mistake of fact" rule as to delusion, announced by the Judges after McNaughton's case and usually followed today, which is based on the premise that except for the delusion the person is entirely sane, resulted from the testimony of Dr. E. T. Monro in McNaughton's Case. He was asked: "Is it consistent with the pathology of insanity, that a partial delusion may exist, depriving the person of all self-control, whilst the other faculties are sound?" (Answer) — "Certainly: monomania may exist with general sanity." 4 Rep. St. Tr. (N. S.) 919. This view of delusion was in perfect accord with the psychology of the time, which regarded each function of the brain as independent of the others. PATON, PSYCHIATRY, 119.

Doe, J., in State *v.* Pike, 49 N. H. 399, 437 (1870) and Somerville, J., in Parsons *v.* State, 81 Ala. 577, 584 (1886) state that the "knowledge of right and wrong" test is based on an early medical theory. The writer, though convinced that this statement is correct, has not been able to verify it completely. There is no doubt, however, that the inability to distinguish between right and wrong was regarded by the medical profession as a characteristic symptom of insanity. (See testimony of John Connolly, physician to the Hunwell Lunatic Asylum, in Queen *v.* Oxford, 4 Rep. St. Tr. (N. S.) 498, 540 (1840).) It was early laid down by the commentators that a lunatic was not responsible, *because* he was unable to know right from wrong.) "Those who are under a natural disability of distinguishing between good and evil, as ideots and lunatics are not punishable by any criminal prosecution whatsoever." 1 HAWK. P. C. 1.) As physicians testified that particular defendants were unable to distinguish right from wrong, this became the test of, rather than the reason for, irresponsibility.

The earlier tests were likewise based on contemporaneous medical views. Sir Matthew Hale's dissertation on the law of insanity shows clearly its medical origin. The following statement is an interesting illustration: "Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient, rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *stupor*, memory quite lost, the phantasy quite broken, or extremely disordered." HALE, P. C. 31.

The theory that the existence of delusion is the test of insanity, which prevailed in the law during the early part of the nineteenth century, was in accordance with the views of the medical profession. In 1810 Dr. Robert Darling Willis stated the following definition of insanity before a committee of the House of Commons: "In insanity the mind is occupied upon some fixed assumed idea, to the truth of which it will pertinaciously adhere, in opposition to the plainest evidence of its falsity; and the individual is always acting under that false impression." Dr. Francis Willis, in a treatise published in 1823, quotes this definition and says: "An unsound mind is marked by delusion." TREATISE ON MENTAL DERANGEMENT, 43, 221.

A great variety of symptomic tests of responsibility was early announced, as is shown by the following statement: "Thence has arisen so many ridiculous and untenable opinions, unsound and illogical propositions, unsafe and dangerous precedents. A regards motive as sufficient test; B requires knowledge of morality or immorality of

the scientific knowledge of the present sharply conflicts. The proposed section does not limit the defense to any particular form or symptoms of mental disease.

III. The proposed section does away with all legal definitions of insanity. For purposes of determining criminal responsibility, the law, in some jurisdictions, has prescribed the requisites of insanity.[113] Much of the confusion that frequently arises when insanity is set up as a defense is due to the conflict between the legal definition of insanity, and the conception of mental disease held by the medical experts.[114] The proposed section does not contain the word "insanity" and does not attempt to say what shall constitute such a mental condition.

IV. Under the proposed section the medical and legal professions will each perform their proper functions. Mental disease constitutes a medical problem, and the diagnosis and symptomatology of it should be determined by physicians. Criminal responsibility, on the other hand, is a legal question,[115] and the rules for determining such responsibility should be fixed by the law, and administered by the legal profession. Under the proposed section the medical witness will state his opinion regarding the mental condition of the defendant at the time of the alleged offense,[116] and the

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act; C demands a comprehension of its relations to the law; D argues from the presence or absence of self-restraint; E considers the existence of delusion essential; F associates delusion with act; G rejects the mental unless corroborated by the physical condition; H commingles insanity with crime; and ALL contribute somewhat to involve the question in almost inextricable perplexity. We might extend this list: to do so would be merely to repeat what we have already propounded." WILLIAMS, UNSOUNDNESS OF MIND, 205 (London, 1856).

[113] See the New York statute quoted *supra* for an example of this.

[114] "We believe that a want of harmony must ever exist between the legal and medical doctrines of insanity in its connexion with responsibility. The two cannot be identical, and for this reason: — Law demands a fixed rule — Medicine admits but a general principle. What would be thought of the physician who undertook in the definition of any, even the simplest, disease, to say, 'Certain symptoms must be present'? His theory would lead to a series of disappointments, his practice be a continuation of blunders! Yet, Law steps forward with her definition of unsoundness of mind; and, according to this definition, on which both the life and reputation of society may depend, one half mankind are mad, and half the mad are wise." WILLIAMS, UNSOUNDNESS OF MIND, 2.

[115] "Criminal responsibility means accountability for one's actions to the criminal law." From first report of this committee, 2 J. CRIMINAL LAW AND CRIMINOLOGY, 523.

[116] "The physician's duty in court cases is simply to discover the mental condition of the patient. This having been done, the question of the responsibility or irresponsi-

judge will then describe to the jury the mental element involved in the crime charged. The function of the jury will be to determine whether the defendant, as a result of the mental condition portrayed by the witness, had the particular state of mind described by the judge. It will not be necessary for the expert witness or the judge to use technical terms in performing their respective functions, and as a result the jury will have less difficulty than at present in reaching an intelligent and appropriate verdict.

V. The proposed section establishes the principle that mental disease, like intoxication and provocation, may lessen the degree of a crime.

VI. The proposed section prescribes a practical test. Under the present system the issue is beclouded by the introduction of special tests and unusual terminology. These have an inhibiting effect upon all persons concerned in the trial, so that they frequently lose sight of the real issue involved. Under the proposed section, the practice in a case where the defense is insanity will not differ from that of the ordinary case.

It may perhaps be argued that, as the proposed section does not contain a definite specification of mental symptoms, some courts may continue to apply their present rules in spite of the statute. This may be so. A study of the decisions under the Married Women's Property Acts and the uniform Negotiable Instruments Law shows that some courts persist in following their previous holdings no matter how the statute is phrased. The most that can be expected of any repealing statute is that it will guide an open-minded court to the indicated result. Many courts now recognize the illogical and unsatisfactory character of the present rules regarding insanity, which statutes or precedents compel them to follow, and will welcome the opportunity to be free of their restraint.

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bility, competency or incompetency, of a man in this mental state is a matter of law and to be decided by judge and jury." Dr. Chas. W. Burr, 48 J. AM. MEDICAL ASSOCIATION, 1852, 1855.